PD-0870-18
COURT OF CRIMINAL APPEALS
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IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

FILED
COURT OF CRIMINAL APPEALS
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JAMES E. WILLIAMS, APPELLANT	§	
V.	§	**NO. PD-0870-18**
THE STATE OF TEXAS, APPELLEE	§	

PETITION FOR DISCRETIONARY REVIEW FROM THE COURT OF APPEALS FOR THE SECOND DISTRICT OF TEXAS' UNPUBLISHED 2-1 PANEL OPINION IN CASE NUMBER 02-17-00001-CR, IN THE APPEAL FROM CAUSE NUMBER 1469951R, IN THE 297TH DISTRICT COURT OF TARRANT COUNTY, TEXAS; THE HONORABLE DAVID HAGERMAN, PRESIDING.

STATE'S BRIEF ON THE MERITS

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IDENTITY OF JUDGE(S), PARTIES AND COUNSEL

- The parties to the trial court's judgment are the State of Texas and Appellant, Mr. James E. Williams.

- The trial judge was the Honorable David Hagerman (elected judge of the 297th District Court, Tarrant County, Texas).

- Counsel for the State at trial were Tarrant County Criminal Assistant District Attorneys, Kimberly D'Avignon and Randi Hartin, 401 W. Belknap Street, Fort Worth, Texas 76196-0201.

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TO THE JUDGES OF SAID COURT:

STATEMENT OF THE CASE

CHARGE .....AGGRAVATED KIDNAPPING
[CR 7, 231]

THE PLEA .....NOT GUILTY
[CR 230, 261; 3 RR 8]

THE VERDICT (Jury)..... GUILTY ATTEMPTED KIDNAPPING
(lesser included offense of Count One)
[CR 235, 261; 9 RR 6]

THE SENTENCE (Jury).....2 YEARS STATE JAIL
[CR 258, 261]

SECOND COURT OF APPEALS ..... AFFIRMED
2-1 Panel Decision
(Gabriel, J., joined by Sudderth, C.J.)
Dissent and Concurrence
(Pittman, J.)

COURT OF CRIMINAL APPEALS ..... GRANTED STATE'S PDR

STATEMENT REGARDING ORAL ARGUMENT

The Court has determined that oral argument will not be permitted in this case.

ISSUES PRESENTED

The Second Court of Appeals erred when it held that a trial court can only enter a "nunc pro tunc" order after it loses plenary power.

The Second Court of Appeals erred when it held that it had jurisdiction over Appellant's nunc pro tunc issue because the nunc pro tunc was a separate appealable order and required a timely notice of appeal.

STATEMENT OF FACTS

The issue before the Court is a purely procedural one, therefore, the applicable facts are as follows:

On October 6, 2016, JAMES E. WILLIAMS ("Appellant") was convicted of attempted kidnapping and sentenced to two years in the Texas Department of Criminal Justice - State Jail Division. [CR 261] That same day, the trial court signed its certification of Appellant's right of appeal. [CR 260]

On October 13, 2016, Appellant filed a motion for new punishment trial and arrest of judgment. [CR 266] On October 24, 2016, Appellant filed his motion for new trial. [CR 278]

On October 25, 2016, the trial court signed a Nunc Pro Tunc Order Correcting Minutes of the Court *sua sponte*. [CR 298] The Nunc Pro Tunc Order corrected the Sex Offender Registration Requirements and Age of Victim listed on the judgment. [CR 298] Appellant did not file any motions/objections to the nunc pro tunc order.

On December 16, 2016, Appellant filed his notice of appeal. [CR 317]

On appeal, Appellant only attacked the trial court's October 25, 2016 nunc pro tunc order. *See Williams v. State*, No. 02-17-0000-CR, 2018 WL 3468458, at *1 (Tex. App. – Fort Worth July 19, 2018, pet. granted).

SUMMARY OF THE ARGUMENT

ISSUE ONE: The trial court's order correcting its prior judgment was signed while the trial court retained plenary power. Although labeled as a "Nunc Pro Tunc Order," the court of appeals concluded that the order was merely a modification of the judgment and not an order "nunc pro tunc." The court of appeals reasoned that a "nunc pro tunc" order/judgment, by definition, can only be entered *after* the trial court loses plenary power. However, Texas case law and the rules of appellate procedure suggest that the majority is incorrect. The Court of Appeals erred when ruling that a trial court does not have the authority to enter a nunc pro tunc while it retains plenary power.

ISSUE TWO: A trial court's order correcting a clerical error in the judgment is a valid nunc pro tunc order. Under Texas law, a nunc pro tunc order is an "appealable order under TEX. R. APP. P. 26.2 (a)(1). As such, Appellant had 30 days to file his notice of appeal. Because Appellant's notice of appeal was untimely, the Second Court of Appeals erred when holding that it had jurisdiction to decide Appellant's nunc pro tunc issue.

ARGUMENT

I. The Second Court of Appeals erred when it held that a trial court can only enter a "nunc pro tunc" order after it loses plenary power.

A. The Second Court of Appeals held that the trial court's "nunc pro tunc" order was merely a modified judgment because it was signed while the trial court retained plenary power.

Under Texas law, a nunc pro tunc order (in a criminal case) constitutes a separate appealable order. *See Blanton v. State*, 369 S.W.3d 894, 903-04 (Tex. Crim. App. 2012). Therefore, the State argued that Appellant's general notice of appeal was not adequate as to the trial court's nunc pro tunc order. *See Williams v. State*, 2018 WL 3468458, at *1. However, the Second Court of Appeals held that the order correcting the prior judgment, even though titled "nunc pro tunc," could not be a "nunc pro tunc" order because it was signed while the trial court retained plenary power. *See id.* at *4. The Second Court of Appeals reasoned that a true nunc pro tunc order can only be entered after the trial court loses its plenary jurisdiction. *Id.* As such, the Court of Appeals concluded that the order correcting the prior judgment in the instant case: (1) was merely an order "modifying" the judgment (during the trial court's plenary power), and (2) was not a "nunc pro tunc" order. *Id.*

B. Contrary to the Second Court of Appeals' holding, the trial court has always had the inherent authority to, at any time, correct clerical errors by order nunc pro tunc so that its records, judgments, and orders reflect what actually occurred.

The Second Court of Appeals held that the trial court had no authority to sign a nunc pro tunc while possessing plenary power because Rule 23.1 allows for a nunc pro tunc order "only if the trial court's plenary power to determine the case has expired." *See Williams v. State*, 2018 WL 3468458, at *4. Notably, nothing in Rule 23.1 states this.

Moreover, the trial court has always had inherent authority to correct clerical errors (during its plenary power or after), and this authority does not stem from Rule 23.1 or its predecessor rules. As the dissent in *Blanton v. State* explained the narrow scope of Rule 23.1:

> [Rule 23.1] is concerned with the failure to render judgment at all; it has nothing to do with correcting a clerical error in a written judgment.
>
> . . . [Rule 23.1's predecessor] Article 42.06 codified some long-standing rules regarding what to do when the trial court has failed to enter an appealable judgment. In the late nineteenth and early-to-mid twentieth centuries, a criminal conviction was appealable only if a judgment had been entered before the trial court lost jurisdiction. Early in that period, the trial court lost jurisdiction when two events occurred (1) the defendant filed a notice of appeal, and (2) the court term in which the notice was filed expired. A judgment could not be validly entered while appeal was pending. If an appellate court determined that no valid judgment had been entered, then the appeal had to be dismissed. Once

> the appeal was dismissed, however, the trial court could enter a valid judgment *nunc pro tunc*. The defendant could then appeal from the *nunc pro tunc* judgment.

Blanton v. State, 369 S.W.3d at 905-06 (Keller, P.J., dissenting) (citations omitted); *but see State v. Bates*, 889 S.W.2d 306, 309 (Tex. Crim. App. 1994) ("Rule 36 vests a trial court with the authority to correct mistakes or errors in a judgment or order after the expiration of the court's plenary power, via entry of a judgment nunc pro tunc.").[1]

So, where does the trial court's nunc pro tunc authority to correct mistakes in its records originate? In 1855, the Supreme Court of Texas held:

> Every court has a right to judge of its [sic] own records and minutes; and if it appear satisfactorily to them that an order was actually made at a former term and omitted to be entered by the clerk, they may at any time direct such order to be entered on the records as of the term when it was made. A court has a right to amend the records of any preceding term by inserting what had been omitted either by the act of the court or the clerk.

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[1] In 1856, article 686 of the first Texas Code of Criminal Procedure, Rule 23.1's first predecessor, was enacted. *See* TEX. CODE CRIM. PROC. art. 686 (Vernon 1856). Though article 686 was renumbered numerous times between its enactment and 1986, the substance has remained substantially the same. *See* TEX. CODE CRIM. PROC. art. 797 (Vernon 1879); TEX. CODE CRIM. PROC. art. 837 (Vernon 1895); TEX. CODE CRIM. PROC. art. 772 (Vernon 1925) (added the title "sentence nunc pro tunc"); TEX. CODE CRIM. PROC. art. 42.06 (Vernon 1965) (changed to "at any subsequent time"); TEX. R. APP. P. 36 (West 1986); TEX. R. APP. P. 23.1 (West 1997).

Burnett v. State, 14 Tex. 455, 456 (Tex. 1855) (correcting an indictment). In 1939, this Court held:

> It was the court's duty to *enter* in the *minutes* of the court a *true* record of the judgment *rendered*. 2 Vernon's Crim. Statutes, art. 853 [Vernon's Ann. C. C. P. art. 766]. Failing to make such record at that time, article 2015, Vernon's Civil Statutes [Vernon's Ann. Civ. St. art. 2228], gave the court authority to amend the record according to the truth. This authority existed by the inherent power to so correct its minutes at a subsequent term.

Ex parte Mattox, 137 Tex. Crim. 380, 386, 129 S.W.2d 641, 644 (Tex. Crim. App. 1939) (emphasis in the original) (citations omitted). Article 853 of the Texas Code of Criminal Procedure merely defined "judgment" and listed what was required therein. TEX. CODE CRIM. PROC. art. 853 (Vernon 1911), *see also* TEX. CODE CRIM. PROC. art. 766 (Vernon 1925). And article 2015 of the Texas Civil Statutes allowed for the trial court to correct any mistakes in the record or judgment to reflect the truth. TEX. CIV. ST. art. 2015 (Vernon 1911); *see also* TEX. CIV. ST. art. 2228 (Vernon 1925). Therefore, this Court pointed not to the "nunc pro tunc" statute, but to both the trial court's duty and inherent authority to maintain a true and correct record. *See Ex parte Mattox*, 129 S.W.2d at 644.

In 1940, this Court noted in *Ex parte Patterson* that "[w]e think there is no doubt of the court's power to enter a judgment nunc pro tunc independent of [article

859].” 141 S.W.2d 319, 322-23 (Tex. Crim. App. 1940).[2] Then, in 1960, this Court pointed back to *Ex parte Mattox*, as support that the trial court had “authority to correct minutes so as to make them truly reflect the judgment pronounced.” *See Koudelka v. State*, 334 S.W.2d 444, 445 (Tex. Crim. App. 1960). Since *Koudelka*, it appears that courts, including this one, have cited to the “nunc pro tunc” rule when discussing clerical errors in the judgment. *See, e.g., State v. Bates*, 889 S.W.2d at 309; *Jones v. State*, 795 S.W.2d 199, 201 (Tex. Crim. App. 1990).[3] But there does not appear to be authority (or reasoning) that the trial court’s authority to correct clerical errors arises solely from Rule 23.1. This appears to be confirmed by the dissent in *Blanton* that Rule 23.1, as written, “has nothing to do with correcting a clerical error in a written judgment.” *Blanton v. State*, 369 S.W.3d at 905-06 (Keller, P.J., dissenting).

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2 The Court then noted that a clerical error could also fall under the statute because earlier cases had held that failure to enter a correct judgment was a failure to render judgment. *Id.* (citations omitted).

3 *See also Smith v. State*, 439 S.W.3d 451, 460 (Tex. App. – Houston [1st Dist.] 2014, no pet.); *State v. Posey*, 300 S.W.3d 23, 33 (Tex. App. – Texarkana 2009), *affirm’d State v. Posey*, 330 S.W.3d 311 (Tex. Crim. App. 2011); *State v. Dudley*, 223 S.W.3d 717, 721-22 (Tex. App. – Tyler 2007, no. pet.); *Fortson v. State*, 948 S.W.2d 511, 512-13 (Tex. App. – Amarillo 1997, pet. ref’d).

In light of the foregoing, Texas criminal courts have always had the inherent authority to enter nunc pro tunc orders both during their plenary power and after their plenary power expires.

C. The Second Court of Appeals erroneously concluded that the Texas Rules of Appellate Procedure Rule 23.1 creates a distinction between plenary power nunc pro tunc orders and post plenary power nunc pro tunc orders.

The Second Court of Appeals' erroneous and artificial distinction between nunc pro tunc orders "during plenary power" versus "post-plenary power" arises from a flawed interpretation of Rule 23.1. The Second Court of Appeals drew the "during plenary" versus "post-plenary" distinction based on the language of Rule 23.1:

> This reasoning is further supported by the fact that nunc pro tunc proceedings regarding a trial court's judgment and sentence may be had *"at any time" but only if a new trial was not granted, the judgment was not arrested, or the defendant did not appeal*. *See* TEX. R. APP. P. 23.1. *In other words, only if the trial court's plenary power to determine the case has expired*.

Williams v. State, 2018 WL 3468458, *at 4 (emphasis added). But the language in Rule 23.1 that a nunc proceeding may be at "at any time" unless a motion for new trial or a motion in arrest of judgment has been *granted* or unless a notice of appeal has been filed, necessarily means that nunc pro tunc orders can be entered while the

trial court retains plenary power. This language in Rule 23.1 certainly does not mean "only if the trial court's plenary power to determine the case has expired" as the Second Court of Appeals found.

Under the language of Rule 23.1, a nunc may be signed at any time: (1) *before* a notice of appeal has been filed, and (2) before a motion for new trial or a motion in arrest of judgment has been *granted*. For example, the trial court could sign a nunc pro tunc 15 days after the conviction (i.e., during the trial court's plenary power) at a time when no notice of appeal has been filed and before a motion for new trial or arrest of judgment has been filed (much less granted). The plain language of Rule 23.1 would allow the nunc pro tunc under this scenario. But this scenario illustrates the fundamental error in the Second Court's interpretation of Rule 23.1 (i.e., the Court's interpretation that Rule 23.1 only contemplates/allows a nunc pro tunc after the trial court's plenary power has expired).

In addition, it appears the Second Court of Appeals' reached its flawed interpretation by erroneously defaulting to civil rules and cases where "[a] true nunc pro tunc judgment is one correcting clerical errors executed *after* the trial court has lost plenary power." *See Ferguson v. Naylor*, 860 S.W.2d 123, 126 (Tex. 1993)

(emphasis in original); TEX. R. CIV. P. 316, 329b (West 2017).[4] However, the fact that Rule 23.1 specifically applies to "Nunc Pro Tunc Proceedings in *Criminal Cases*" would suggest that the rule was intentionally made to be different from its civil counterpart. *See* TEX. R. APP. 23. 1 (emphasis added).

Further, the Second Court of Appeals interpretation of Rule 23.1 is inconsistent with case law from this Court. On at least two occasions, this Court has held that the trial court was within its power to enter a nunc pro tunc before the appeal *because* the trial court had continuing plenary jurisdiction. *See Resnick v. State*, 574 S.W.2d 558, 560 (Tex. Crim. App. 1978) ("Before the appellate record was filed in this Court, a nunc pro tunc hearing was held, and the judgment and sentence were corrected. The trial court was within its power in entering the judgment and sentence nunc pro tunc."); *Perkins v. State*, 505 S.W.2d 563, 564 (Tex. Crim. App. 1974) (the trial court entered "a nunc pro tunc order correcting the judgment and the sentence to reflect a conviction for felony theft rather than for burglary as entered originally as the result of a clerical error."). This Court, in *Perkins*, even stated that it did

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[4] Recently, in *State v. Hanson*, this Court discussed the inapplicability of civil statutes, including Rule 329b of the Texas Rules of Civil Procedure, to cases "construing a statute, not judicial precedent or construction of the Texas Rules of Civil Procedure. 555 S.W.3d 578, 580 (Tex. Crim. App. 2018).

> not interpret Article 42.06, Vernon's Ann. C. C. P. (which provides that a judgment and sentence may be entered nunc pro tunc if there has been a failure to enter the same 'unless a new trial has been granted, or the judgment arrested, or an appeal has been taken') as prohibiting the action of the trial court herein.

Id. Therefore, Rule 23.1, like its predecessor article 42.06, does not prohibit the trial court from signing a nunc pro tunc order while the trial court retains plenary power.

The Second Court of Appeals erroneously concluded that Rule 23.1 holds otherwise.

D. This Court's recent recognition of modified judgments does not limit the scope of the trial court's authority to sign nunc pro tunc orders during its plenary power, but rather gives the criminal practitioner an additional tool with which to seek the correction of errors in judgments and sentences.

1. A trial court's ability to correct judicial errors through a modification of the judgment and sentence appears to be a recent development.

As explained above, the trial court's authority to correct its records through a nunc pro tunc order precedes the Texas Code of Criminal Procedure. *See Burnett v. State*, 14 Tex. at 456; TEX. CODE CRIM. PROC. art. 686 (Vernon 1856). But it appears that the ability for the trial court in criminal cases to modify its judgment and sentence is much more current. As recent as 2005, this Court appears to have first held that "a trial court retains plenary power to modify its sentence if a motion for new trial or motion in arrest of judgment is filed within 30 days of sentencing." *See*

State v. Aguilera, 165 S.W.3d 695, 697-98 (Tex. Crim. App. 2005) (citing prior concurring opinions from the Court that have touched on the subject of plenary power). The purpose of this change was to give the court a way to correct judicial decisions in the judgments and sentences. *See id*. And subsequent case law supports that the intent of the modified judgment was to correct judicial errors and not clerical ones. *See, e.g., Tiede v. State*, No. 06-16-00083-CR, 2017 WL 3401402, at *13 (Tex. App. – Texarkana Aug. 9, 2017, pet. ref'd) (mem. op., not designated for publication) (appellate court renamed nunc pro tunc as a "modified judgment" because it corrected judicial errors); *Loud v. State*, 329 S.W.3d 230, 241 (Tex. App. – Houston [14th Dist.] 2011, pet. ref'd) (Frost, J., dissenting) (opining trial court's order should have been affirmed because it was a proper exercise in plenary jurisdiction to correct judicial errors). Therefore, the trial court does now have limited authority to modify its judgment and sentence through a modified judgment.

2. Contrary to the Second Court of Appeals' conclusion, whether the trial court retains plenary jurisdiction to correct judicial errors is irrelevant to the trial court's ability to correct clerical errors.

But, the Second Court of Appeals appears to hold that, because the trial can modify its judgments, the court's ability to sign nunc pro tunc judgments is limited. *See Williams v. State*, 2018 WL 3468458, at *3-4. However, there is no authority to

support the conclusion that it is an either/or situation. And there may be reasons why a party would file a motion for a nunc pro tunc order over a motion to modify the judgment.

It should be noted that this is not the only circumstance where a practitioner has options to achieve the same result. For example, a defense attorney raising a pre-trial double jeopardy or statute of limitations issue may file a pre-trial writ of habeas corpus or a motion to quash the indictment. *Compare Ex parte Watkins*, 73 S.W.3d 264 (Tex. Crim. App. 2002) (pre-trial writ for double jeopardy claim), *with Stevenson v. State*, 499 S.W.3d 842, 844 (Tex. Crim. App. 2016) (motion to quash indictment on double jeopardy grounds); *and compare Hernandez v. State*, 127 S.W.3d 768 (Tex. Crim. App. 2004) (motion to quash indictment on statute of limitations grounds), *with Ex parte Dickerson*, 549 S.W.2d 202 (Tex. Crim. App. 1977) (pre-trial writ for statute of limitations indictment claim). Likewise, a defense attorney seeking a bond reduction may file a pre-trial writ of habeas corpus or a motion to set reasonable bond. *Compare Ex parte Weise*, 55 S.W.3d 617, 619 (Tex. Crim. App. 2001) (pre-trial writ for reasonable bond), *with Ragston v. State*, 424 S.W.3d 49, 52 (Tex. Crim. App. 2014) (no right to appeal denial of motion to set reasonable bond). While there is no right to interlocutory appeal, there may be a

reasonable strategy for filing motions in lieu of pre-trial writs of habeas corpus. And the fact that there are two procedural tools to accomplish the same goal does not invalidate or limit either tool.

Similarly, there is no basis in law for the conclusion that the availability of a modified judgment limits the option of a nunc pro tunc order.

3. The appropriate inquiry as to whether the trial court's order was a proper nunc pro tunc order or a modified judgment should have been whether it was a correct use of a nunc pro tunc and not whether it was entered while the trial court retained plenary jurisdiction.

When appellate courts construe an order, they consider its effect on the trial proceedings and "the substance [of the order] and not just the label attached to it." *See Smith v. State*, 559 S.W.3d 527, 533 (Tex. Crim. App. 2018) (citations omitted) (the trial court's new judgment was actually an order granting shock probation for purposes of appellate jurisdiction); *see also State v. Savage*, 933 S.W.2d 497, 499 (Tex. Crim. App. 1996) (holding that the trial court's JNOV was improper but was "the functional equivalent of granting a motion for new trial.").[5] However, these

[5] *State v. Bates*, 889 S.W.2d at 310 (because the intent of the order "was to grant a new trial" the State could appeal.); *State v. Evans*, 843 S.W.2d 576, 578 (Tex. Crim. App. 1992) (the trial court order was "functionally indistinguishable from an order granting a new trial"); *Tiede v. State*, 2017 WL 3401402, at *13 (the modified judgment was "mistakenly titled" a nunc pro tunc because it corrected judicial errors and not clerical ones.).

reclassifications appear to only occur when the original order was improper and where a party has the choice of allowable options. *See, e.g., Smith v. State*, 559 S.W.3d at 533 ("The only way in which the trial court's subsequent 'judgment' in this case may be understood as being *permitted by law* is as a written order granting Smith's motion for shock probation by suspending execution of the sentence."). Therefore, because the trial court had the authority to enter a nunc pro tunc order while it retained plenary power, the Second Court should have only looked at whether the Nunc Pro Tunc Order was proper when determining whether it was a nunc pro tunc order or a modified judgment.

Ultimately, the Second Court of Appeals held that the corrections were appropriate for a nunc pro tunc order. *See Williams v. State*, 2018 WL 3468458, at *4 (citations omitted). Therefore, the Second Court of Appeals should have concluded the trial court's Nunc Pro Tunc Order was a proper nunc.

In short, the Second Court of Appeals erred in holding that the trial court did not have the authority to enter the Nunc Pro Tunc Order while it still had plenary power.

II. Because the trial court's Nunc Pro Tunc Order was proper, the Second Court of Appeals was without jurisdiction without a timely notice of appeal.

A. The Dissent properly held that the Second Court of Appeals was without jurisdiction because Appellant's notice of appeal was not timely as to the nunc pro tunc order.

As explained above, the trial court acted within its inherent authority to correct clerical errors when it entered the Nunc Pro Tunc Order. Entry of this October 25, 2016, Nunc Pro Tunc Order was a proper and valid exercise of the trial court's plenary power. As such, the October 25, 2016, order is a valid nunc pro tunc order.

As the dissent noted, Rule 26.2 (a)(1) of the Texas Rules of Appellate Procedure provides the deadline for filing a notice appeal of the Nunc Pro Tunc Order:

> A nunc pro tunc order is an appealable order; a notice of appeal challenging it must therefore be filed within thirty days after the trial court signs it.

Williams v. State, 2018 WL 3468458, at *6 (citations omitted)[6]; *see also* TEX. R. APP. P. 26.2 (a)(1).

> Appellate rule 26.2 provides that a criminal defendant's notice of appeal must be filed:

[6] As the majority notes, Appellant's appeal was limited to challenging the October 25, 2016, Nunc Pro Tunc. *Williams v. State*, 2018 WL 3468458, at *2.

> (1) within 30 days after the day sentence is imposed or suspended in open court, or after the day the trial court enters an appealable order; or
>
> (2) within 90 days after the day sentence is imposed or suspended in open court, if the defendant timely files a motion for new trial.

Id. at *5 (citing Tex. R. App. P. 26.2)

Based on the plain language of Rule 26.2, the dissent correctly concluded that Appellant's notice of appeal was untimely:

> A motion for new trial does not extend the deadline for filing a notice of appeal from an order nunc pro tunc because it is merely "an appealable order."

Id. at *5.

> "A plain reading of the rule reveals that a timely-filed motion for new trial can only extend the deadline for filing an appeal from the imposition or suspension of a sentence; it cannot extend the deadline for filing an appeal from a mere 'appealable order.'" *Martin v. State*, No. 2-06-272-CR, 2007 WL 529905, at *1 (Tex. App.—Fort Worth Feb. 22, 2007, no pet.) (mem. op., not designated for publication); *see also Ex parte Delgado*, 214 S.W.3d 56, 58 (Tex. App.—El Paso 2006, pet. ref'd) (mem. op.) (noting "[r]ule 26.2(a)(2) does not include 'or other appealable order' in providing for" an extension of time to file a notice of appeal based on a motion for new trial and concluding under "the [rule's] plain language" that when the appealed order "does not involve imposition or suspension of a sentence, the notice of appeal must be filed within the thirty-day time period provided by rule 26.2(a)(1)"); *Welsh v. State*, 108 S.W.3d 921, 922 (Tex. App.—Dallas 2003, no pet.) (same).

Id.[7] So, the majority erred when it held that the motion for new trial extended the time for filing the notice of appeal as to the trial court's Nunc Pro Tunc Order. *See id.*

Appellant's notice of appeal, filed more than thirty days after the trial court signed the Nunc Pro Tunc Order, was untimely. *Id.* at *6. As the dissent below concluded, the Second Court of Appeals was without jurisdiction to entertain Appellant's appeal. *Id.* In short, the dissent was correct: the majority erred when it did not dismiss Appellant's appeal for want of jurisdiction. *Id.*

B. This Court's recent decision in Smith v. State supports the conclusion that Appellant's notice of appeal was untimely as to the trial court's nunc pro tunc order.

The State filed its petition for discretionary review on September 19, 2018. *See Petition*, No. PD-0870-18, p. 1. On September 26, 2018, this Court rendered its decision in *Smith v. State*. *See Smith v. State*, 559 S.W.3d at 527. While that case focused on the applicability of TEX. R. APP. P. 27.1(b) (premature notices of appeal) and need for a separate notice of appeal when a motion for shock probation is filed

[7] However, the majority held, based on its erroneous conclusion that the trial court was without authority to enter the Nunc Pro Tunc Order, that Rule 26.2 (a)(2) applied. *Id.* at *3 (citations omitted). The majority then concluded that Appellant's timely filed motion for new trial extended the timing for filing of the notice of appeal for the trial court's order. *Id* (citations omitted).

after the general notice of appeal is filed, this Court's discussion regarding "other appealable orders" is instructive. *Id.* at 535.

In that case, Smith filed his general notice of appeal after he was convicted. *Id.* at 529. Five months after the appeal was docketed, but before he filed his brief, Smith filed a motion for shock probation. *Id.* The trial court granted the motion. *Id*. While Smith did not file a second notice of appeal as to the new order, he did challenge the new order on appeal. *Id.* at 530. Smith argued that his general notice of appeal should be considered "premature" and became timely when the trial court's order was signed pursuant to Rule 27.1(b) of the Texas Rules of Appellate Procedure. *Id.* However, this Court found that Rule 27.1(b) did not apply because Smith was "appealing a stand-alone, appealable order." *Id.* at 533-34.

This Court pointed out as follows:

> [W]e have made clear that in Texas, appeals from convictions, and appeals from orders, are two different things.
>
> . . .
>
> Other examples of appealable orders that require a notice of appeal include: an order entering a *nunc pro tunc* judgment; an order setting bail while on appeal; and an order denying a motion for post-conviction DNA testing. None of these appeals arise in the "ordinary" appellate context. Neither does a complaint about excessive restitution, imposed as a condition of shock probation. *Such appeals are separate from the appeal of the conviction itself and must be perfected by a separate*

> *notice of appeal.*
>
> *In these situations, the timetable for filing a notice of appeal is triggered by the signing of the appealable order.*

Id. at 534-35 (emphasis added and in the original). This Court concluded as follows:

> Just as a general notice of appeal filed after pronouncement of sentence would not invoke appellate jurisdiction over a later denial of a motion for DNA testing, a general notice of appeal does not invoke appellate jurisdiction over an order granting shock probation either. The appeal of an order granting shock probation is independent of an appeal from adjudication and sentencing. It is a separate appeal of a separate appealable order, with its own timetable. It requires a separate notice of appeal. In the absence of a timely notice of appeal, the court of appeals properly dismissed Smith's appeal.

Id. at 536-37.

It is true that the timing of the filings is distinguishable. Smith filed his motion for shock probation over *five months* after his conviction and sentence. *Id.* at 529. This Court noted that the trial judge, therefore, "ha[d] no authority to issue a new judgment and sentence some five months after adjudication" and "[t]he only way in which the trial court's subsequent 'judgment' in th[at] case may be understood as being permitted by law is as a written order granting Smith's motion for shock probation by suspending execution of the sentence." *Id.* at 533. However, that was in response to the fact that the trial court labeled the order as a judgment. *Id.*

Here, the nunc pro tunc order was signed *within three weeks* of Appellant's

conviction. [CR 261, 298] And the opposite has happened: the trial court labeled it as a separate appealable order but the appellate court re-labeled it as a modified judgment. *See Williams v. State*, 2018 WL 3468458, at *4. But, if this Court holds that the nunc pro tunc order was a proper order, then the holding in *Smith v. State* applies. That is, the nunc pro tunc is a "separate appealable order, with its own appellate timetable [and] require[d] a separate notice of appeal." *See Smith v. State*, 559 S.W.3d at 537. Thus, when Appellant's notice of appeal was filed more than thirty days after the nunc pro tunc order was signed, it was untimely. *See* TEX. R. APP. P. 26.2 (a)(1).

C. To hold that Appellant's general notice of appeal was timely as to the trial court's nunc pro tunc order would lead to absurd results.

In holding that the general notice of appeal applied to the trial court's nunc pro tunc order, the Second Court of Appeals implied that holding the trial court's nunc pro tunc was a separate appealable order would lead to absurd results.

> To hold as the State urges would lead to a conclusion in this case that there were three separately calculable deadlines for Williams to file his notice of appeal, each dependent on the claim raised and each based on actions taken by the trial court during its plenary power: (1) ninety days after the trial court imposed sentence in open court for claims arising from his conviction of the lesser-included offense; (2) thirty days after the trial court's entry of the first nunc pro tunc order for claims arising from the registration requirement; and (3) thirty days after the trial

> court's entry of the second nunc pro tunc order for claims arising from the time-credit calculation.

See Williams v. State, 2018 WL 3468458, at *3. However, this Court discussed this possibility when holding that orders granting shock probation were appealable. *See Shortt v. State*, 539 S.W.3d 321, 326 (Tex. Crim. App. 2018). As this Court pointed out:

> To avoid confusion, we could hold that the appeal from the order granting "shock" community supervision is independent of the appeal from the original written judgment – a separate appeal of the order suspending the *execution* of the sentence, with its own appellate timetable, *but subject to being consolidated with the appeal from the original written judgment*.

Id. at 326 (emphasis added and in the original); *see also Smith v. State*, 559 S.W.3d at 536-37. Therefore, this Court has contemplated, and has held, that separate notices of appeal are required when separate appealable orders are entered soon after conviction. *Id.* What will lead to absurd results is holding that a nunc pro tunc order is a separate appealable order, except when it is not (as the Second Court of Appeals has held).

Case law is clear: a nunc pro tunc order is a separate appealable order. *See Blanton v. State*, 369 S.W.3d at 903-04. If the nunc pro tunc order is proper, then it should be considered a separate appealable order regardless of when it was signed.

To hold that a proper nunc pro tunc order is a separate appealable order, except when it is signed while the trial court has plenary power, could only lead to absurd results and more confusion. And the one thing nunc pro tunc law does not need is more confusion among the bench and the bar.

Therefore, the Second Court of Appeals erred when it held that Appellant's general notice of appeal was sufficient as to the trial court's nunc pro tunc order because the nunc pro tunc order was proper and a separate appealable order requiring a separate appellate timetable.

PRAYER

The State prays that the court of appeals' judgment be vacated and this Court dismiss the case for want of jurisdiction.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

There are 7365 words in this entire document, including portions of the document covered by, and excluded from, TEX. R. APP. P. 9.4(i)(1).

/s/ Andréa Jacobs
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CERTIFICATE OF SERVICE

A copy of the State's Brief on the Merits has been electronically sent to counsel for Appellant, Mr. Colin McLaughlin, at colin@hoellermclaughlin.com, and the State Prosecuting Attorney, Ms. Stacey M. Soule, State Prosecuting Attorney, at information@spa.texas.gov, on the 25th day of February, 2019.

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